MOHD FAKRI MOHD ROZALI v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
ABDUL AZIZ RAHIM JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEALS NO: D-05-9-01-2014 & D-05-10-01-2014]
15 DECEMBER 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 12(2) – Reduction of charge to one of possession – Appeal against conviction and sentence – Whether statutory caution administered in accordance with s. 37A(1) – Discovery of drugs – Whether information provided – Appellant's conduct – Whether considered – Whether presumption under s. 37(da) rebutted – Whether third party admitted keeping drugs in appellant's room – Whether reasonable doubt raised in prosecution's case – Whether trial judge considered appellant's defence*

CRIMINAL PROCEDURE: *Accused – Cautioned - Dangerous Drugs Act 1952, s. 12(2) – Drugs found in appellant's room – Whether statutory caution administered in accordance with s. 37A(1) – Whether statement admissible – Reliance of – Whether provisions in ss. 8 & 27 of Evidence Act 1950 invoked – Francis Antonysamy v. PP*

On 3 August 2012, a police party led by SP6 raided a house where the appellant was found in one of the rooms. The prosecution's case was that when SP6 asked the appellant whether he kept any illegal substance, the latter confessed that he kept some 'ice'. The appellant then climbed on a shoe rack and took a plastic packet containing a crystal like substance which was kept on top of a cupboard. The contents were later confirmed to be methamphetamine. In the High Court, the appellant was charged for trafficking in 156.02 grams of the said drugs. It was the defence's case that the drugs were recovered as a result of a search of the room. According to the defence, on 3 August 2012, one Pok San ('SP7') came to the appellant's room and wanted to keep something there. The appellant informed SP6 about this and led the police party to SP7's house where he was later arrested by the police. The trial judge reduced the charge to one of possession under s. 12(2) of the Dangerous Drugs Act 1952 ('DDA') and sentenced the appellant. Aggrieved, the appellant appealed against the conviction and sentence and the prosecution appealed against the reduction of the charge. In accordance with s. 37A(1) of the DDA, it was argued that the statement between SP6 and the appellant ('exh. P14') was inadmissible since SP6 did not give any oral evidence of the statutory caution administered on the appellant. Further, it was submitted that it was highly prejudicial for the appellant when the trial judge relied on (i) the contents of exh. P14 and invoked s. 27 of the Evidence Act 1950 ('the Act'); and (ii) the appellant's conduct under s. 8 of the Act.

Held (allowing appellant's appeal; dismissing prosecution's appeal)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) The statutory caution was not properly administered by SP6. Further, SP6 testified that he prepared a note every time he conducted a raid. As such, exh. P14 was inadmissible as there was no oral evidence of SP6 on the statutory caution administered to the appellant as required by s. 37A(1) of the DDA. Since exh. P14 was inadmissible, the contents thereof could not be relied upon (*Francis Antonysamy v. PP*; foll). (paras 21, 23 & 25)

(2) Apart from the alleged confessions by the appellant, there was no other information provided by the appellant such as to lead the police to the discovery of the drugs. Hence, s. 27 of the Act was not applicable. As for the reliance of conduct under s. 8 of the Act, it had been emphasised in *Ibrahim Mohamad & Anor v. PP* that evidence of conduct must not be considered in isolation but together with other aspects of the case. On the facts, it was the defence's version that the drugs were recovered as a result of the search by the police. However, the trial judge did not address this aspect of the defence. This failure amounted to a misdirection and had occasioned a failure of justice to the appellant. As such, reliance on the conduct of the appellant was unsafe. (paras 28 & 29)

(3) The presumption under s. 37(da) of the DDA could not be rebutted without sufficient evidence, namely evidence which was reasonably sufficient to invite belief in its probable truthfulness. On the facts, there was sufficient evidence from SP7 who admitted going to the appellant's house on 3 August 2012. The appellant's defence that the drugs were placed by SP7 was credible, probable and logical and raised a reasonable doubt on the prosecution's case. (paras 30 & 31)

(4) SP7's arrest was pursuant to the appellant's information that the former came to the appellant's room and kept the drugs there. The trial judge also made an affirmative finding on SP7's role. The appellant had no power to deal with and to dispose of the drugs. Since there was no physical element of possession, the appellant's conviction was not sustainable. (paras 33 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Pada 3 Ogos 2012, pasukan polis yang diketuai oleh SP6 telah menyerbu sebuah rumah di mana perayu didapati berada di dalam salah sebuah bilik. Kes pihak pendakwaan adalah bahawa apabila SP6 bertanyakan kepada perayu sama ada dia menyimpan barangan larangan, perayu mengaku bahawa dia menyimpan beberapa 'ais'. Perayu kemudian memanjat rak kasut dan mengambil satu bungkus yang mengandungi bahan seperti kristal yang disimpan di atas almari. Kandungannya kemudian disahkan adalah methamphetamine. Di Mahkamah Tinggi, perayu telah dituduh mengedar

156.02 gram dadah tersebut. Kes pembelaan adalah bahawa dadah itu dikesan apabila bilik perayu diserbu. Menurut perayu, pada 3 Ogos 2012, seorang bernama Pok San ('SP7') datang ke biliknya dan menyimpan sesuatu di sana. Perkara ini dimaklumkan oleh perayu kepada SP6 dan pasukan polis telah dibawa ke rumah SP7 di mana SP7 ditangkap oleh polis. Hakim bicara mengurangkan pertuduhan kepada milikan di bawah s. 12(2) Akta Dadah Berbahaya 1952 ('ADB') dan menjatuhkan hukuman terhadap perayu. Terkilan, perayu merayu terhadap sabitan dan hukuman dan pihak pendakwaan pula merayu terhadap pengurangan tuduhan. Berikutan s. 37A(1) ADB, adalah dihujahkan bahawa kenyataan antara SP6 dan perayu ('esk. P14') tidak boleh diterima masuk memandangkan SP6 tidak memberi sebarang keterangan lisan berkenaan amaran berkanun yang diberi kepada perayu. Tambahan lagi, dinyatakan bahawa perayu diprejudis apabila hakim bicara bergantung kepada (i) kandungan eks. P14 dan membangkitkan s. 27 Akta Keterangan 1950 ('Akta'); dan (ii) kelakuan perayu di bawah s. 8 Akta.

Diputuskan (membenarkan rayuan perayu; menolak rayuan pendakwaan) Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) SP6 tidak memberi amaran berkanun dengan sempurna. Tambahan, SP6 memberi keterangan bahawa dia telah menyediakan nota setiap kali serbuan dibuat. Oleh itu, eks. P14 tidak boleh diterima memandangkan tiada keterangan lisan daripada SP6 berkenaan pemberian amaran berkanun seperti diperuntukkan di bawah s. 37A(1) ADB. Memandangkan eks. P14 tidak boleh diterima, maka kandungan di dalamnya tidak boleh disandarkan (*Francis Antonysamy v. PP*; diikuti).

(2) Selain daripada pengakuan yang diberikan oleh perayu, tiada maklumat lain diberi oleh perayu yang menyebabkan pihak polis mengesan dadah yang terbabit. Oleh itu, s. 27 Akta tidak terpakai. Bagi pemakaian s. 8 Akta pula, telah pun ditekankan dalam *Ibrahim Mohamad & Anor v. PP* bahawa keterangan kelakuan tidak boleh dipertimbangkan secara berasingan tetapi bersama-sama dengan semua aspek yang lain. Berdasarkan fakta, adalah versi pembelaan bahawa dadah dikesan akibat serbuan pihak polis. Walau bagaimanapun, hakim bicara tidak merekodkan pembelaan perayu tersebut. Kegagalan ini menyebabkan satu salah arah dan kegagalan keadilan bagi perayu. Oleh itu, pergantungan pada kelakuan perayu adalah tidak selamat.

(3) Anggapan di bawah s. 37(da) ADB tidak boleh dipatahkan tanpa keterangan yang mencukupi, iaitu, keterangan munasabah yang boleh dipercayai. Berdasarkan fakta, terdapat keterangan mencukupi daripada SP7 yang mengakui bahawa dia telah pergi ke rumah perayu pada 3 Ogos 2012. Pembelaan perayu bahawa dadah diletakkan oleh SP7 adalah kredibel, berkemungkinan dan logik dan telah membangkitkan keraguan munasabah terhadap kes pendakwaan.

A **(4)** Tangkapan SP7 adalah berdasarkan maklumat perayu bahawa SP7 telah datang ke bilik perayu dan menyimpan dadah di situ. Hakim bicara juga membuat dapatan afirmatif terhadap peranan SP7. Perayu tidak mempunyai kuasa untuk mengendali dan menghapuskan dadah itu. Memandangkan tiada unsur fizikal milikan, maka sabitan perayu tidak
B boleh bertahan.

Case(s) referred to:
Attan Abdul Gani v. PP [1969] 1 LNS 12 HC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(foll)***
C *Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC* ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 59 FC ***(refd)***
Lim Pah Soon v. PP [2013] 8 CLJ 800 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohd Zaiham Mislan v. PP [2010] 1 CLJ 1 FC ***(refd)***
D *Parlan Dadeh v. PP [2009] 1 CLJ 717 FC* ***(refd)***
PP v. Teh Eng Wah [1999] 8 CLJ 451 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(da), 37A(1)(b), 39B(2)
Evidence Act 1950, ss. 8, 27
E Federal Constitution, art. 5

(Criminal Appeal No: D-05-9-01-2014)
For the appellant – Hisyam Teh Poh Teik (Sukri Mohamed & Melissa Sukri with him); M/s Teh Poh Teik & Co
For the respondent – Mohd Fairuz Johari; DPP

F *(Criminal Appeal No: D-05-10-01-2014)*
For the appellant – Mohd Fairuz Johari; DPP
For the respondent – Hisyam Teh Poh Teik; Sukri Mohamed & Melissa Sukri with him); M/s Teh Poh Teik & Co

[Appeal from High Court, Kota Bharu; Criminal Trial No: 45A-1-1-2013]

G *Reported by Kumitha Abd Majid*

JUDGMENT

Tengku Maimun JCA:

H **[1]** Mohd Fakri bin Mohd Rozali ('the appellant') was charged in the High Court at Kota Bharu for trafficking in 156.02g of methamphetamine, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act').

I **[2]** At the end of the defence case, the learned trial judge relied on *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 and *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311;

[1991] 3 MLJ 169 and reduced the charge to one of possession under s. 12(2) of the Act. The appellant was sentenced to 14 years imprisonment with effect from the date of his arrest and ten strokes of the rotan.

[3] Aggrieved by the above decision, both the appellant and the prosecution filed their respective appeals. Appeal No. D-05-9-01-2014 is the appellant's appeal against the conviction and sentence and Appeal No. D-05-10-01-2014 is the prosecution's appeal against the reduction of the charge.

[4] Briefly, the prosecution's case is as follows. On 3 August 2012, a police party led by SP6 raided an unnumbered house at Jalan Pasir Hor, Kampung Padang Enggang, Kota Bharu. He went to the room where the appellant was sleeping. SP6 woke up the appellant, identified himself as a police officer and administered the caution under s. 37A(1)(b) of the Act. SP6 asked the appellant whether the appellant kept any illegal substance. The appellant confessed that he kept some 'ais'.

[5] When SP6 asked the appellant where it was, the appellant then climbed the shoe rack and from the top of the cupboard, the appellant took a plastic packet containing crystal like substances which were later confirmed by the chemist ('SP4') to be methamphetamine, the subject matter of the charge.

[6] At the end of the prosecution's case the learned trial judge made the following findings (rekod rayuan: ms. 143):

> Mahkamah ini memutuskan bahawa pihak pendakwaan telah berjaya membuktikan bahawa tertuduh mempunyai milikan, kawalan dan pengetahuan berkenaan dadah di atas almari di dalam biliknya itu.
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> Bilik tersebut hanya didiami oleh tertuduh sahaja bukan dikongsi dengan ahli keluarga yang lain. Ini dapat dilihat dari keterangan abang ipar tertuduh iaitu SP5 dan semasa serbuan hanya tertuduh sahaja berada di dalam bilik tersebut dan barang-barang yang dijumpai termasuk buku bank (P11B) dan geran kereta atas nama tertuduh dan kunci bilik (P11D).
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> Begitu juga seluar jeans (P10B) diambil di dalam bilik berkenaan adalah sesuai dengan tertuduh apabila SP8 pegawai penyiasat mencubanya.
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> Kedudukan paket plastik berisi dadah terletak di atas almari adalah agak ke belakang dan tidak boleh nampak melalui pandangan biasa melainkan apa yang tertuduh lakukan iaitu memijak di atas almari kasut di sebelahnya dan mengambil paket plastik berkenaan. Dengan kata lain hanya tertuduh yang berpengetahuan bahawa barang tersebut tersimpan di situ sahaja boleh terus mengambilnya. Jika paket plastik dadah itu terdedah di atas lantai sesiapa sahaja akan perasan akan paket plastik berkenaan. Kelakuan tertuduh ini adalah relevan menurut s. 8(2) Akta Keterangan 1950 ...
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> ...

Kes pendakwaan dikuatkan dengan penggunaan s. 37A(1)(b) Akta Dadah Berbahaya yang tidak dicabar atau dibantah oleh peguambela dan catitan antara SP6 dan jawapan tertuduh ditanda sebagai P14. Di dalam P14 tertuduh ditanya oleh SP6:

S: Adakah kamu menyimpan apa-apa barang salah?

J: Ada, ais.

S: Boleh kamu tunjukkan kepada saya?

J: Boleh.

S: Adakah Ais ini kamu punya?

J: Ya, saya punya.

S: Bukan orang lain punya?

J: Saya punya.

Oleh itu pemakaian s. 27 Akta Keterangan adalah berkaitan dengan apa yang dinyatakan oleh tertuduh kepada SP6 itu.

[7] Having found that the appellant had possession of the drugs and having invoked the presumption of trafficking under s. 37(da) of the Act by virtue of the weight of the methamphetamine, the learned trial judge called upon the appellant to enter his defence.

[8] In his evidence given under oath, the appellant disputed the version of SP6 as regards the recovery of the drugs. His version was that the drugs were recovered as a result of a search of the room. The appellant further stated that the drugs belonged to Mohd Fadli Sham also known as Pok San ('SP7'). According to the appellant, on 3 August 2012, SP7 came to his room where SP7 had told the appellant that he wanted to keep something in the appellant's room. After his arrest, the appellant informed SP6 about SP7 and led the police to SP7's house. SP7 was subsequently arrested by the police.

[9] At the end of the whole case, the learned trial judge said (rekod rayuan: ms. 155):

> Saya berkeputusan bahawa atas imbangan kebarangkalian, pihak tertuduh berjaya menyangkal anggapan tersebut dengan mana SP7 adalah memainkan sebahagian peranannya atas dadah yang dijumpai, namun tertuduh masih lagi mempunyai kawalan dan pengetahuan ke atas dadah yang dikatakan diletakkan oleh Pok San itu dan terlibat sama apabila segala keterangan sekeliling menunjukkan tertuduh mengetahui bahawa Pok San adalah penagih dadah dan kerap keluar masuk ke rumah dan bilik tertuduh masakan dadah bernilai tinggi disimpan oleh Pok San sekalipun tanpa pengetahuan tertuduh.

[10] We heard both the appeals together at the end of which we had allowed the appeal by the appellant and dismissed the appeal by the prosecution. We now give our reasons.

The Appeal

[11] Learned counsel for the appellant canvassed the following grounds of appeal:

(i) That the learned trial judge misdirected himself when he acted on inadmissible evidence;

(ii) That there was violation of a right to fair trial; and

(iii) That the appellant was entitled to an acquittal.

[12] On the first ground, the complaint of learned counsel for the appellant was that in relying on exh. P14 to find a *prima facie* case of trafficking and ultimately to convict the appellant for the offence of possession, the learned trial judge had failed to address the question of admissibility of exh. P14.

[13] It was submitted by learned counsel that P14 was inadmissible as there was no oral evidence given by SP6 of the statutory caution that was administered by SP6 on the appellant. Further, the act of the appellant in climbing the shoe rack and taking the plastic packet, submitted learned counsel, amounts to a statement and as such was also inadmissible.

[14] The second issue canvassed by learned counsel was taken as point of law. It was the submission of learned counsel that an accused person is entitled to a fair trial and as decided by the Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, art. 5 of the Federal Constitution guarantees that right.

[15] In the instant appeal, it was submitted that the reliance by the learned trial judge on exh. P14 and on the contents and the invocation of s. 27 of the Evidence Act 1950 and thereafter acted on the conduct of the appellant under s. 8, represented an "overkill" and was highly prejudicial to the appellant.

[16] On the third ground, it was submitted that by reason of the finding that the presumption of trafficking under s. 37(da) of the Act had been rebutted, the learned trial judge ought to have acquitted the appellant.

[17] In appealing against the reduction of the charge from trafficking to one of possession, learned Deputy Public Prosecutor submitted that exh. P14 was correctly admitted as caution was administered by SP6. Learned Deputy Public Prosecutor contended that exh. P14 was only corroborative evidence and that the learned trial judge did not rely on exh. P14 in finding a *prima facie* case against the appellant.

[18] Relying on the case of *Mohd Zaiham Mislan v. PP* [2010] 1 CLJ 1, learned Deputy Public Prosecutor argued that the conduct of the appellant in climbing on the shoe rack to take the drugs on top of the cupboard is admissible under s. 37A of the Act without the need for the prosecution to show that caution had been administered. Such conduct of the appellant, submitted learned Deputy Public Prosecutor, was correctly considered by the learned trial judge under s. 8 and s. 27 of the Evidence Act 1950.

[19] Finally learned Deputy Public Prosecutor submitted that the learned trial judge erred in finding that the appellant had rebutted the presumption of trafficking under s. 37(da) of the Act as the denial by the appellant without any other evidence was not capable of rebutting the presumption on the balance of probability.

Our Decision

[20] In support of the argument that exh. P14 was inadmissible, learned counsel cited the case of *Francis Antonysamy v. PP* [2005] 2 CLJ 481; [2005] 2 AMR 750 where the Federal Court said at pp. 491-493 (CLJ); pp. 761 to 763 (AMR):

> It must be observed that the need to administer the caution as required by s. 113(1)(a)(ii) is an explicit endorsement and preservation of the privilege against self-incrimination as it gives the accused the option to remain silent. It is perhaps to ensure that this privilege is not diluted in any way that s. 113(1)(a)(ii) provides that a statement made by a person after his arrest shall not be admissible in evidence "... unless the court is satisfied that a caution was administered to him in the following words or words to the like effect ..." It can therefore be seen that the satisfaction of the court on the administration of the caution goes to the very root of the admissibility of a statement that had been made. What requires consideration is whether a mere reading of the caution will amount to the court being "satisfied" that it had been administered.
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> ...
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> The logical corollary is that evidence that the caution under s. 113 was merely read will deprive the court of the opportunity to exercise its discretion in order to determine whether the caution that was administered is as prescribed or to the like effect. It will amount to the court accepting the conclusion of the witness that the prescribed caution had been administered when the conclusion is one that must be arrived at by the court itself based on evidence that has been adduced. The court can be "satisfied" that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the court would be in a position to determine whether the caution that was administered is a prescribed or to the like effect or is something that is different. Oral evidence of the words used is particularly significant in this case as it is subject to appellate review. There is no such evidence though the words used appear in the cautioned statement.
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> ... It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution he read is as recorded in the cautioned statement.
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> The result is that there is no evidence before the court in order to be "satisfied" whether the caution that was administered is as prescribed or contain words to that effect.

[21] As in *Francis Antonysamy* (*supra*), in the instant appeal, SP6 did not state in his evidence the caution that was administered on the appellant. What SP6 did was to testify that he prepared a note every time he conducted a raid. His evidence was as follows (rekod rayuan: ms. 37):

> Saya kemudian kejutkan OKT itu dan dia bangun dan arah Sjn dan SI kawal OKT. Saya selepas kejutkan OKT dan tunjuk kad polis. OKT berdiri. Saya baca kata-kata amaran s. 37A(1)(b) ADB.
>
> OKT ada mengata simpan dadah dalam bilik itu.
>
> Saya baca kepada OKT dengan nota kecil setiap kali serbuan saya akan gunakan jika perlu, saya ada bawa hari ini.
>
> Mahkamah: Ditunjukkan nota kepada peguambela dan mahkamah.
>
> Ini adalah nota baru tetapi yang sama. Saya baca dan dia faham bila saya jelaskan kepada beliau.

[22] At p. 49: rekod rayuan:

> S: Apabila OKT bangun, apa yang awak bagitahu OKT?
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> J: Saya baca kata-kata amaran kepada tertuduh dalam Bahasa Malaysia standard. Saya berasal daripada Kuantan, Pahang.
>
> S: Awak tidak fasih dalam dialok (*sic*) Kelantan?
>
> J: Betul.
>
> S: Awak tidak membacakan amaran itu dan tidak terjemah dalam dialok (*sic*) Kelantan kepada OKT?
>
> J: Betul.
>
> ...
>
> S: Awak tidak terangkan kepada OKT s. 37A(1) itu baca sahaja?
>
> J: Benar.

[23] In the light of the above evidence of SP6, we were not satisfied that statutory caution was properly administered by SP6 and if administered was understood by the appellant. Learned Deputy Public Prosecutor offered no submission on why we ought not to follow *Francis Antonysamy*, a decision of the Federal Court, though learned Deputy Public Prosecutor cited *Mohd Zaiham Mislan v. PP* [2010] 1 CLJ 1, another Federal Court decision. In *Mohd Zaiham* (*supra*) the Federal Court through Zulkefli Ahmad Makinuddin FCJ (as His Lordship then was) said:

> [17] It is my considered view there is no statutory requirement under the law, be it under the Criminal Procedure Code or the Dangerous Drugs Act 1952 ("the Act") that the caution administered by the recording officer to the accused person must be explained. The caution as found in s. 37A(1) of the Act states as follows:

A It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

[18] It is clear that the above provision is silent as to whether the caution must be explained to ensure comprehension of it. ... On the issue B of whether there is a requirement to explain the caution to the accused person, I am of the view it would very much depend on the facts and circumstances of each case. ...

[19] On the facts of this case I do not think SP9 is required to explain the caution to the appellant after it was administered. The caution was C administered in the Malay language as the appellant is a Malay person. ...

[20] SP9 had testified that he had explained the caution to the appellant although he had not recorded the explanation factor in the impugned statement. ... It is my view that as SP9 had stated in evidence that he had explained the caution to the appellant the burden is on the appellant to D cross-examine SP9 as to the form and manner of explanation given to him. ...

[24] We noted that in the case of *Mohd Zaiham* (*supra*), caution was in fact administered and explained to the appellant.

E **[25]** Based on the principles in *Francis Antonysamy* (*supra*) we found merits in the submission by learned counsel for the appellant that exh. P14 was inadmissible as there was no oral evidence of SP6 on the statutory caution administered to the appellant as required by s. 37A(1) of the Act. Since exh. P14 was inadmissible, it follows that the contents thereof could not be relied upon.

F **[26]** From the judgment of the learned trial judge, it was apparent that apart from exh. P14, the learned trial judge relied on the following evidence to find a *prima facie* case against the appellant:

(i) The room where the drugs were found was only occupied by the appellant;

G (ii) The drugs were located on top of a cupboard which was not easily visible;

(iii) The appellant knew about the drugs such that he could take the drugs from the cupboard; and

(iv) Conduct under s. 8 and s. 27 of the Evidence Act 1950.

H **[27]** Learned counsel's grievance, which formed the second ground of appeal, was on the following approach of the learned trial judge which was contended to be highly prejudicial to the appellant:

(i) Acted on the confession in exh. P14;

I (ii) Relied on the contents of P14, and find that the prosecution could also invoke s. 27 of the Evidence Act 1950 and then thereafter; and

(iii) Acted on conduct of the appellant under s. 8 of the Evidence Act 1950.

Another complaint was that the answers given by the appellant, namely "Ya, saya punya" and "saya punya" were clear confessions which learned counsel contended, on the authority of *Krishnan Ramar v. Public Prosecutor* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145; [1987] 1 MLJ 292, that they do not lead to discovery of the drugs.

[28] We agreed with learned counsel that the answers "Ya, saya punya" and "saya punya" were confessions and that apart from the alleged confessions by the appellant, there was no other information provided by the appellant such as to lead the police to the discovery of the drugs. On the facts, it was our view that s. 27 was not applicable in the instant case.

[29] As for the reliance of conduct under s. 8 of the Evidence Act 1950, it has been emphasised by the Federal Court in *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 that evidence of conduct must not be considered in isolation but together with other aspects of the case. Further, an inference of knowledge many be drawn from proved facts (see Parlan Dadeh v. PP [2009] 1 CLJ 717). We noted that the version of SP6 that the drugs were taken by the appellant from the top of the cupboard after the appellant had confessed to keeping it was challenged by the defence. It was the defence version that the drugs were recovered as a result of the search by the police. This was an important aspect of the defence but nowhere did the learned trial judge address this aspect of the defence. This failure in our judgment, amounts to a misdirection and had occasioned a failure to justice to the appellant (see *Lim Pah Soon v. PP* [2013] 8 CLJ 800) which renders reliance on the conduct of the appellant unsafe.

[30] As regards the presumption of trafficking under s. 37(da) of the Act, we agreed with the submission of learned Deputy Public Prosecutor that the presumption cannot be said to have been rebutted without sufficient evidence, namely evidence which is reasonably sufficient to invite belief in its probable truthfulness (see *Attan Abdul Gani v. Public Prosecutor* [1969] 1 LNS 12; [1970] 2 MLJ 143b). In the instant appeal, we found that there is sufficient evidence from none other than Pok San himself (SP7) who had admitted going to the appellant's house at 6am on 3 August 2012 (rekod rayuan: pp. 61, 64).

[31] Seen in the light of the evidence of SP7, it was our view that the issue whether it was SP7 who had kept the drugs in the room was left at large. We found that the defence of the appellant that the drugs were placed by SP7 was credible, probable and logical and had raised a reasonable doubt on the prosecution's case (see *PP v. Teh Eng Wah* [1999] 8 CLJ 451).

[32] The appellant's version that he had informed the police about SP7 was supported by the following evidence of SP6 (pp. 43 to 44: rekod rayuan):

S: Lebih kurang jam 6 pagi, kawan OKT ada pergi ke rumah beliau?

J: Saya tidak tahu.

...

A Maklumat Pok San merujuk kepada lelaki bernama Fadli Sham. Lokasi Pok San pada hari kejadian ditunjukkan oleh OKT.

...

S: Maklumat tentang Pok San awak perolehi semasa soal siasat OKT di dalam kenderaan pasukan?

B

J: Betul.

[33] If, as contended by the prosecution that the appellant had confessed that the drugs were his and his alone, there was no necessity for the appellant to provide a name to SP6. The reasonable conclusion from the evidence of C SP6 was that the arrest of SP7 was pursuant to the appellant's information that SP7 came to his room and had kept the drugs there. In fact the learned trial judge had made an affirmative finding on the role of SP7 as follows (p. 155: rekod rayuan):

Saya berkeputusan bahawa atas imbangan kebarangkalian, pihak tertuduh D berjaya menyangkal anggapan tersebut dengan mana SP7 adalah memainkan sebahagian peranannya atas dadah yang dijumpai ...

[34] Notwithstanding the learned trial judge's affirmative finding on the role of SP7 as regards the drugs found in the appellant's room, His Lordship found (p. 155: rekod rayuan):

E

... namun tertuduh masih lagi mempunyai kawalan dan pengetahuan ke atas dadah yang dikatakan diletakkan oleh Pok San itu dan terlibat sama apabila segala keterangan sekeliling menunjukkan tertuduh mengetahui bahawa Pok San adalah penagih dadah dan kerap keluar masuk ke rumah dan bilik tertuduh ...

F **[35]** From the above, the learned trial judge found that the appellant had control and knowledge of the drugs on the premise, that the appellant knew SP7 was a drug addict and the appellant knew that SP7 had access to the house and to the appellant's room. The learned trial judge, in our view erred in his premise in finding possession against the appellant.

G **[36]** Given the defence which we found to be not inherently improbable, and given the evidence of SP7, we were of the view that the conviction of the appellant on possession is not safe. If the drugs belonged to and were kept by SP7, the appellant had no power to deal with and to dispose the drugs. Absence of the physical element of possession, we found that the conviction H of the appellant for the offence under s. 12(2) is not sustainable. We therefore unanimously allowed the appeal of the appellant. The conviction and sentence imposed by the High Court was set aside. The appellant was acquitted and discharge. The appeal by the prosecution was dismissed.

I